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Supreme Court, U.S.
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In the
Supreme Court of the United States

October Term, 1971

No. 71-5685

DAISY JOHNSON, ET AL., PETITIONERS,

v.

NEW YORK STATE EDUCATION DEPARTMENT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND EDUCATION HARVARD UNIVERSITY, AND THE UNITED MINISTRIES IN PUBLIC EDUCATION, IN SUPPORT OF THE PETITION

J. Harold Flannery
Robert Pressman
Paul R. Dimond
Jeffrey Kobrick
Center for Law and Education,
Harvard University

The United Ministries
in Public Education

Blanchard Press, Inc., Boston, Mass. — Law Printers

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Introduction

We present this brief in support of the petition for a writ of certiorari with the consent of all parties, pursuant to Supreme Court Rule 42(1).[1] We rely on the petitioners'

[1] Copies of the three letters of consent are attached to our covering letter to the Clerk of this Court.

treatment of this Court's jurisdiction, the questions presented for review and the constitutional and statutory provisions involved in this case.

The opinion of the district court dismissing the complaint is reported as *Johnson* v. *New York State Education Department,* 319 F. Supp. 271 (E.D.N.Y., 1970). The decision of the Court of Appeals affirming the district court's decision, Circuit Judge Irving Kaufman dissenting, is unreported. We cite the official slip opinion, copies of which we have furnished.

Interest of the Amici

The Center for Law and Education, Harvard University, was formed in 1969. Sponsored jointly by the Harvard Law School and the Harvard Graduate School of Education, the Center is funded by the United States Office of Economic Opportunity to work with local legal service offices and other attorneys on behalf of the poor, to promote reform in education. Center attorneys have worked on problems in the following areas: school fees (about which we have received numerous inquiries); student rights; resource allocation, within and between school districts; "ability grouping" practices; racial discrimination; and federal programs, particularly Title I of the Elementary and Secondary Education Act of 1965. The Center publishes a bulletin, *Inequality in Education.*

Center personnel have participated in significant litigation; done research and writing; drafted legislation; and negotiated with public officials. The Court of Appeals entered orders in this case accepting a brief and a reply brief, *amicus curiae,* filed by the Center. The Court's opinion referred to these briefs.[2] In the October, 1970 term, this Court

[2] "In addition to the briefs of the parties, this court has the advantage of a well-prepared brief and reply brief submitted by the Center for Law and Education of Harvard University." (Slip Op. at 4650.)

accepted an *amicus curiae* brief prepared by Center attorneys in the cases involving aid to parochial schools. See *Lemon* v. *Kurtzman*, 91 S.Ct. 915.

The Center's affiliation with the Harvard Graduate School of Education facilitates our presenting to courts educational data which is material under governing legal principles. In this brief, we present such data bearing upon the "interests of those who are disadvantaged by the [challenged] classification." *Kramer* v. *Union Free School District*, 395 U.S. 621, 626.

The United Ministries in Public Education (UMPE) was created by a group of agencies of the Episcopal Church, Presbyterian Church of the United States, the United Church of Christ, and the United Presbyterian Church, U.S.A., to serve as a joint agency of these religious communions. Its purpose is to assert that the Church is a vital force in our society and as such must accept its accountability for education. The UMPE serves to support the public educational system where it is contributing to the humane development of persons and to call for reevaluation of the system where needed. The UMPE works in coalition with others for the reform of educational policy and practice where necessary.

The stated goals of this program cover a wide spectrum of concerns for equalized educational opportunity for all. The goals specifically include an endorsement of support of litigation seeking to equalize educational opportunity by challenging special tax measures and tax allocation formulas for public education which perpetuate inequality of opportunity.

Statement

Parents of elementary school students in Union Free School District No. 27, Town of Hempstead, began this action. They alleged, *inter alia*, that the denial of textbooks to their children because of their indigency violated the equal protection clause of the Fourteenth Amendment. (App. at 13-14; Third Claim.)[3] They prayed, in part, for an injunction against enforcement of Section 701 of the New York Education Law, and such "alternative relief as the Court may deem to be just and appropriate." (App. at 15-16.) The district court dismissed the complaint for failure to state a claim, without holding an evidentiary hearing, and the Court of Appeals affirmed, Judge Kaufman dissenting.

The Answer of the defendant local school officials, the Superintendent and School Board of District 27, forthrightly admits, in our view, that the challenged statutory scheme for textbook distribution denies the equal protection of the laws:

> 12. Admit that the denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks. (App. at 46.)

This admission is fully supported by the other facts of record, briefly summarized as follows:

1. Under the statutory scheme,[4] the system in 1970-71

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[3] Our citations are to the appendix "printed for the use of the court below. . . ." Supreme Court Rule 21 (2).

[4] Throughout this brief we refer to the "statutory scheme," with the following meaning: 1) Section 701 of the New York Education Law requires districts to lend textbooks free to students in grades 7-12. 2) Section 703 of the New York Education Law requires districts

(and again in 1971-72 as shown by the Petition) provided free texts to students in grades 7 to 12, but required payment of a $7.50 fee by all students in grades 1 to 6, regardless of the economic status of their families. (Admitted; App. at 8, 45.)

2. The named plaintiffs had a total of five children enrolled in grades 1-3 in the system. (App. at 25, 28, 30.)

3. The Complaint alleged that "[p]laintiffs, recipients of public assistance, are indigent and cannot pay [the] fee." (App. at 4, 9-10.) While the local defendants generally denied this allegation (App. at 45), the named plaintiffs made uncontroverted affidavits, filed in the district court, that they were unable to pay the fee. (App. at 26, 29, 31.)

4. "Children who did not bring the fees demanded were denied text-books . . . ." (Admitted; App. at 8, 45.)

5. The Complaint alleges that in view of plaintiffs' inability to pay the fee "[t]heir children are hence being denied essential text-books, which are nonetheless available to other similarly situated but more wealthy children, and hence receive a significantly inferior education solely because of plaintiffs' indigency."[5] (App. at 4-5.) This allegation is established by the record. In addition to the admission by the local defendants in paragraph 12 of the Answer quoted above, their papers filed in the courts below contain the following statements:

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to lend textbooks free to students in grades 1-6, *only if the voters approve a tax for this purpose.* 3) When, as in this school district in 1970-71 and 1971-72, the voters do not approve this real estate tax for texts for grades 1 to 6 and other purposes, the district can still levy a tax for "ordinary contingent expense." (N.Y. Education Law, Sec. 2023.) 4) Opinion Number 213 of the Counsel to the Education Department, July 6, 1967, holds that expenditures for texts for grades 1-6 are not an "ordinary contingent expense." 5) Accordingly, the district provided texts free to grades 7-12, but charged a fee for grades 1-6. (See Slip Op. at 4647-4649.)

[5] In his dissenting opinion in *Board of Education* v. *Allen*, 392 U.S. 236, 252, Mr. Justice Black stated: "Books are the most essential tool of education, since they contain the resources of knowledge which the educational process is designed to exploit."

> We believe . . . that textbooks for all pupils are essential to a quality educational program and a necessary and fundamentally basic tool in the education of youngsters.
>
> Affidavit of School Board President Donald J. Siskind, September 23, 1970. (App. at 52.)

> The denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks.
>
> Affidavit of Superintendent Edward Moyer, September 25, 1970 (App. at 53.)

> The defendant Board of Education believes that textbooks for all pupils are essential to a quality educational program and a necessary tool in the education of youngsters.
>
> Brief of local defendants in Court of Appeals at 3.

In the District Court, the plaintiffs presented the affidavit of Dr. Gerald G. Glass, Professor of Education and Director of the Reading and Study Center and Graduate Program in Reading at Adelphi University. It reads, in part, as follows:

> No education program can exist without books. It is professionally unthinkable to assume that an educational program of even the meagerest scope would not minimally include books. Books of all kinds, readers, workbooks, trade books, reference books, et al. The process of education, as conceived in this country, assumes that persons must 'learn' not only from their own relatively narrow, actual experiences, but also from that extensive dimension that can only be offered through books. (App. at 40-41.)

> In fact, in my opinion a good case could be made for the grade school as having more pertinent requirements for text-books. Because the early school years are the formative school years a wealth of material needs to be applied to offer the youngsters reinforcement for learning. It is not uncommon that a textbook in the primary grades serves as the major structure for the whole curriculum in any one subject. (App. at 42.)

6. The Complaint alleged, in part, (App. at 15):

> (XII) (b) Indigent children sitting, bookless, side by side in the same classroom with other more wealthy children learning with purchased text books engenders a widespread feeling of inferiority and unfitness in poor children and is psychologically, emotionally and educationally disastrous to their well-being.

While affirming the district court's dismissal of the action, the Court of Appeals majority described this allegation as "quite [realistic]," a position with which Circuit Judge Kaufman dissenting agreed. (Slip Op. at 4649, 4670.)

In summary, this case involves a shocking situation: the challenged statutory scheme requires poor children to attend school without an "essential" educational tool, for reasons wholly beyond their own control; as a direct consequence, they are denied an educational opportunity equal to children from more affluent families, and stigmatized; and all this occurs in a nation whose Constitution guarantees "the equal protection of the laws" and whose president proclaims:

> Economic, educational, social mobility — all these, too, are essential elements of the open society. When

> we speak of equal opportunity we mean just that: that each person should have *an equal chance at the starting line,* and an equal chance to go just as high and as far as his talents and energies will take him.
>
> Statement by the President [Nixon] on Elementary and Secondary School Desegregation, March 24, 1970, at 17. (emphasis added.)

Summary of Argument

1. The motion to dismiss was erroneously granted, given applicable decisions of this Court with which the ruling below conflicts, whether plaintiffs' claim that the statutory scheme denies Fourteenth Amendment rights to indigents is deemed to require a three-judge court, or merely to challenge an application of the legislative scheme. (See discussion at 14-15.)

2. The Second Circuit's ruling conflicts with the decision in *Williams* v. *Page,* —— F. 2d —— (C.A. 7, June 9, 1971), petition for certiorari filed, August 31, 1971, No. 71-313. In reversing the district court's dismissal of a Fourteenth Amendment challenge by indigent students to fees for graduation-related acivities, the Seventh Circuit used a standard which would require an "evidentiary hearing" in this case. (See discussion at 12-13.)

3. The court below found a rational basis for the challenged classification and approved the district court's conclusion that it was supported by a compelling state interest. Each determination conflicts with applicable decisions of this Court. [See points (5) and (6) of Summary.] We submit that the compelling state interest standard should be employed here because the legislative scheme burdens ed-

ucation a "fundamental interest", and creates a "suspect" wealth classification. The decisions of this and other courts, the pronouncements of public officials, the objective treatment of education by Congress and the states and its general importance to the individual and society warrant classifying education a "fundamental interest." This would not require the recognition of a federal constitution right to an education. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 665. In many cases this Court has treated as "suspect" classifications having an *impact* on wealth lines. Moreover, here the lower court acknowledged that poor children would be stigmatized, similarly, we submit, to black students in the dual system; and poor children "are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." *Graham* v. *Richardson*, 91 S.Ct. 1848, 1852. (quoting *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4). (See discussion at 15-22.)

4. The ruling below conflicts with a series of decisions of this court on the scope of the Fourteenth Amendment beginning with *Griffin* v. *Illinois*, 351 U.S. 12 and *Douglas* v. *California*, 372 U.S. 353. In these cases this Court has held that the Fourteenth Amendment requires a state to provide an indigent criminal defendant a document such as a transcript, or an attorney, vital to adequate use of a remedial procedure fully available to more affluent persons. Here, the impact of the challenged statutory scheme parallels *Griffin-Douglas*: a vital interest is at stake (education), and students from indigent families are admittedly denied an educational opportunity equal to students from more affluent families. Accordingly, we submit, the constitutional principles applied in *Griffin-Douglas* require the state to provide texts to indigent students (so long as the state con-

tinues to make books an essential element of the educational process).

The court below erroneously construed *Griffin-Douglas*. First, it said that they were solely due process cases; but see *Williams* v. *Illinois*, 399 U.S. 235, 241. Second, the lower court concluded that in this case state funds are being used to benefit all students, including indigents, with discrimination resulting from private supplements. Similar contentions in *Griffin* and *Douglas*, raised *in dissent* by Justice Harlan, were rejected by the majority which held that the Fourteenth Amendment required more than such "neutrality". This Court has recognized that further action is also required by the Fourteenth Amendment to secure equal educational opportunity. We show that it is not a material distinction that this case involves education rather than the criminal process. Finally, this Court's rulings invalidating fee requirements for voting (*Harper, supra*) and commencing divorce litigation (*Boddie* v. *Connecticut*, 91 S.Ct. 780) also demonstrate the substantiality of plaintiffs' claim. (See discussion at 23-29.)

5. The district court's application of the compelling interest standard, approved by the court below, conflicts with decisions of this court. No doubt because of its failure to hold an "evidentiary hearing", the district court did not consider several concrete, alternative methods, free of the harmful effects of the challenged scheme, for achieving the state's interests. The court below approved a scheme whereby resources are conserved by "invidious distinctions between classes of citizens". *Graham* v. *Richardson*, 91 S. Ct. 1848, 1853. Finally the lower court failed adequately to weigh the interests of the indigent students disadvantaged by the challenged scheme. *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 209-212. The evidence as to the inter-

ests of poor, elementary students is overwhelming. (See discussion at 29-37.)

6. The challenged classification satisfies neither branch of the standard articulated in *Dandridge* v. *Williams*, 397 U.S. 471, 487 ("rationally based and free from invidious discrimination".) It is completely irrational to further two of the purported state interests — conserving resources and maximizing the impact of state aid — by providing texts to the children of the wealthy in grades 7-12 and denying them to children of the poor in 1-6. There is invidious discrimination: poor children are required to attend school, admittedly denied an essential educational tool and equal educational opportunity, and stigmatized, for reasons wholly beyond their own control. Moreover, there are available alternative schemes, avoiding these consequences, which must be considered even if the compelling interest standard doesn't apply. *Carrington* v. *Rash*, 380 U.S. 89, 95-96. (See discussion at 37-40.)

7. The statutory scheme denies due process of law by arbitrarily infringing the interest of indigent children in an education. *Meyer* v. *Nebraska*, 262 U.S. 390; *Williams* v. *Illinois*, 399 U.S. 235, 259-266 (Harlan, J., concurring). There are less onerous alternatives for achieving the purported state interests; and, in certain respects, the statutory scheme is irrational. In addition, the lower court agreed that poor children could be stigmatized. *Wisconsin* v. *Constantineau*, 91 S. Ct. 507. (See discussion at 40-43.)

8. Alternatively, the writ should be granted because this case presents important questions which have not been but should be settled by this Court. The questions are analagous, factually and in significance, to the ones resolved in *Griffin-Douglas*, *Harper* and *Boddie*. (See discussion at 43-44.)

Reasons for Granting the Writ

A. The Court of Appeals Decision in this Case Conflicts with the Ruling in *Williams* v. *Page*, —— F. 2d —— (C.A. 7, June 9, 1971)

The Second Circuit majority affirmed the district court's dismissal of the complaint in this case, explicitly rejecting plaintiffs' contention that the fee requirement for textbooks effectively denies poor children an educational opportunity equal to children from more affluent families in violation of the Fourteenth Amendment. (Slip Op. at 4659-4663.) The Second Circuit's decision is "in conflict with the decision of another court of appeals on the same matter" [Supreme Court Rule 19(1)(b)], the unanimous ruling of the Court of Appeals for the Seventh Circuit in *Williams* v. *Page*, —— F. 2d —— (June 9, 1971),[6] *reversing* 309 F. Supp. 814 (N.D. Ill., 1970). A petition for a writ of certiorari was filed in *Williams* on August 31, 1971, No. 71-313.

Williams v. *Page*, *supra*, is a Fourteenth Amendment challenge by elementary and high school students to the collection of fees as a condition for participation in graduation-related activities in public schools. The complaint alleges that as a consequence of the fee requirement the activities "are not available to the plaintiffs on equal terms because they are indigent." *Williams* v. *Page*, *supra*, 309 F. Supp. at 815. In dismissing the complaint in *Williams*, the district court reasoned similarly to the Court of Appeals here.

The court viewed *Griffin* v. *Illinois*, 351 U.S. 12 and *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, as limited to burdens on only "the most fundamental rights", and noted plaintiff's reliance on the language in

[6] The "order" deciding the *Williams* case is not reported. A copy is Appendix One of this brief.

Brown v. *Board of Education*, 347 U.S. 483, that education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (*Id.* at 816, quoting *Brown I, supra* at 494.) The court held: "plaintiffs are not being denied the opportunity of an education on equal terms [everyone pays the same fee], rather they are potentially being deprived of free access to extra graduation activities." 309 F. Supp. at 816.

The Seventh Circuit's brief order reversing the dismissal of the complaint in *Williams* reads, in part, as follows:

> The complaint alleges that graduation participation is an essential part of a child's education and the complaint may be construed as claiming that in the schools concerned the activities for which the fees are required have been recognized by the school administrators, teachers, parents and students as integral parts of the school experience, from which indigent children are being excluded. Until these and related factual questions are explored at an evidentiary hearing, the precise contours of the constitutional rights which plaintiffs claim were violated are not readily discernible.

Application of the *Williams* standard would require an evidentiary hearing on the complaint in this case. To paraphrase the quoted language, the complaint herein alleges that "fees are required" for textbooks, "an essential part of a child's education", and as a consequence that "indigent children are being excluded." Moreover, in this case, the local defendants expressly admit that the statutory scheme operates to deny poor children an equal educational opportunity.[7]

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[7] The decision by the Court of Appeals in this case is also in conflict with a recent district court decision, *Chandler* v. *South Bend Community School Corporation*, C.A. No. 71 S 51 (N.D. Ind., Aug.

B. The Court of Appeals Decided Fourteenth Amendment Issues in a Way in Conflict with Decisions of this Court.

1. *Preliminary Statement: the Procedural Posture*

The procedural posture of this case is significant. The district court dismissed the complaint for failure to state a claim without requesting that a three-judge court be convened, even though the complaint sought, in part, the enjoining of Section 701 of the Education Law. (App. at 15.) (See 28 U.S.C. 2281, 2284.) The Court of Appeals affirmed. The inquiry accordingly must focus on whether plaintiffs' claim is substantial. See *e.g. California Water Services* v. *City of Redding*, 304 U.S. 252, 255. We maintain that it is, given past decisions of this Court with which the ruling below conflicts, and the requirement that on motion to dismiss the well-pleaded allegations of the complaint and affidavits must be taken as true.[8]

The majority below suggested that this might not be a proper case for a three-judge court. (Slip Op. at 4660, n. 8.) However, even if the lower court viewed the case as involving only an application of the statutory scheme,[9] not requiring a three-judge court, the motion to dismiss should have been denied.

26, 1971), holding that it violates the Fourteenth Amendment to suspend a *student* for three days because of the failure of his *parents* to pay a school fee. The thrust of the decision is that education is a fundamental right, and that a student's right to an education can not be conditioned on factors over which he has no control.

[8] *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 172 (1967); *Cooper* v. *Pate*, 378 U.S. 546.

[9] The complaint challenges, *inter alia*, the application of the statutory scheme to indigent students. (App. at 13-14; Third Claim.) See also *Boddie* v. *Connecticut*, 91 S.Ct. 780, 787, and the dissenting opinion of Judge Kaufman below. ("I dissent and would hold that plaintiffs have established at the very least a substantial claim that *as applied* in . . . District No. 20 . . . New York Education Law §703 deprives indigent children of the equal protection of the laws." (Slip Op. at 4663-4664; emphasis added; footnote omitted.)

Given the allegations of the complaint and affidavits, the admissions of the local defendants and pertinent substantive case law, it can not be said that "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle them to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46; 2A Moore's Federal Practice, § 12.08, at 2271-74 (2d ed., 1968), quoted in *Williams* v. *Page*, —— F. 2d —— (C.A. 7, 1971), discussed above at 12-13.[10]

The three-judge court procedure may not be working as originally envisioned.[11] However, frustration at the process can not be a basis for penalizing plaintiffs whose claims satisfy the standard for convening the statutory court.

2. *The Standard for Reviewing the Challenged Classification.*

Each of the lower courts considered the standard of equal protection review applicable in this case, *i.e.*, "rational relationship to a legitimate state end" (*McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809), or "necessary to promote a compelling state interest." *Kramer* v. *Union Free School District*, 395 U.S. 621, 627. The district court purported to apply the compelling interest standard, finding it satisfied. (319 F. Supp. at 278.) While approving this conclusion, the Court of Appeals held that decisions

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[10] Finally, the court below suggested that it might be necessary for plaintiffs to amend the complaint "to attack the constitutionality of the voter's action." (Slip Op. at 4660, n. 8.) However, plaintiffs did allege the voter's action and challenge the statutory scheme as denying Fourteenth Amendment rights to indigent students. (App. at 7, 12-13.) This surely was adequate. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 46.

[11] See the discussion by the majority and Judge Kaufman below. (Slip Op. at 4650-4655, 4664-4666.)

of this Court "would indicate that [the rational basis] standard . . . is also appropriate in cases such as this." It then upheld the challenged statutory scheme. (Slip. Op. at 4655-4656, 4656-4663; explanation added.)

We demonstrate below that the lower courts applied each standard "in a way in conflict with applicable decisions of this court; . . ." Supreme Court Rule 19(1)(b). We wish to stress at the outset, however, our view that the challenged statutory scheme should be judged by the compelling state interest test. It "must be closely scrutinized and carefully confined" (*Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 670) because, as the local defendants admit, the classification at issue burdens *education*, a "fundamental interest", and draws lines based upon *wealth*, a "suspect" classifying factor.

a) *Education is a "fundamental interest"*

In 1954, this Court unanimously stressed the fundamental importance of educational opportunity in *Brown* v. *Board of Education*, 347 U.S. 483, 493.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is

> denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

During the October, 1970 Term, the Court reiterated this view on the importance of education, quoting from the same part of *Brown I* in *Palmer* v. *Thompson*, 91 S. Ct. 1940, 1943, n. 6.[12] In this case, despite ruling against plaintiffs, the Court of Appeals majority characterized education as "no doubt an area of fundamental importance" (Slip Op. at 4661), a conclusion with which Circuit Judge Kaufman dissenting agreed. (*Id.* at 4667-4669.)

Other lower federal courts have recognized that education is a "fundamental interest". In *Hosier* v. *Evans*, 314 F. Supp. 316 (D. Vir. Is., 1970), the court invalidated, on equal protection grounds, a regulation permitting the exclusion from school of "non-immigrant visitors". In stressing the importance of education, District Judge Christian stated (*Id.* at 319): "We are here dealing with an aspect of twentieth century life so fundamental as to be fittingly considered the corner stone of a vibrant and viable republican form of democracy, such as we so proudly espouse, *i.e.*, free and unrestricted public education." The court rejected the government's argument that existing facilities would become overcrowded, writing: "The short answer to that argument is that *fundamental rights* guaranteed by the Constitution may be neither denied nor abridged solely

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[12] In *Palmer*, this court distinguished the closing of swimming pools involved in *Palmer*, and public schools in *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (E.D. La., 1960), *affirmed per curiam*, 365 U.S. 569, stating: "Of course that case [*Bush*] did not involve swimming pools but rather public schools an enterprise we have described as 'perhaps the most important function of state and local governments.' *Brown* v. *Board of Education* . . . ." *Palmer*, *supra*, 91 S.Ct. at 1943, n. 6; see also 1947 (concurring opinion of Blackmun, J.)

because their implementation requires the expenditure of public funds." 314 F. Supp. at 320. (emphasis added.)

In *Ordway* v. *Hargraves*, 323 F. Supp. 1155 (D. Mass., 1971), the court held impermissible a school board's exclusion from regular classes of a pregnant girl. In the course of the opinion, the district judge stated: "It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty. Consequently the burden of justifying any school rule or regulation limiting or terminating that right is on the school authorities (citation omitted)." The court found no such justification. (*Id.* at 1158.)[13]

The California Supreme Court has recently considered statutory classifications touching upon education, and challenged on equal protection grounds. *Serrano* v. *Priest*, 487 P. 2d 1241 (1971). In an opinion, discussing its own decisions and those of this Court, commentaries[14] and other

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[13] See also *Van Dusartz* v. *Hatfield*, C.A. No. 3-71 Civ. 243 (D. Minn., Memorandum and Order, October 12, 1971), holding education a "fundamental interest" for purpose of determining appropriate standard of equal protection review. ["Education has a unique impact on the mind, personality, and future role of the individual child. It is basic to the functioning of a free society and thereby evokes special judicial solicitude. (Footnote omitted.) Mem. Op. at 7.] *Hargrave* v. *McKinney*, 413 F.2d 320 (C.A.5., 1969), *Hargrave* v. *Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970), *vacated and remanded on other grounds, sub nom. Askew* v. *Hargrave*, 401 U.S. 476; (". . . interests which may well be deemed fundamental . . . ." 413 F. 2d at 328); *Dixon* v. *Alabama*, 294 F.2d 150 (C.A. 5, 1961), holding due process requires notice and opportunity for hearing prior to expulsion of students from public college. ("It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens." *Id.* at 157, per Rives, J.)

[14] Commentaries support our position that education should be considered a "fundamental interest." Coons, Clune and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L.Rev. 305, 382-389 (1969); Kirp, *The Poor, The Schools and Equal Protection*, 38 Harv. Ed. Rev. 635,

pertinent factors, the court concluded: "We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest'." (487 P.2d at 1258; footnote omitted.)

Education is precious not only in its own right, but also because it provides the tools necessary for exercising other rights which this court has recognized as fundamental — voting (*Harper* v. *Virginia State Board of Elections*, 383 U.S. 663); speech (*Lovell* v. *City of Griffin*, 303 U.S. 444, 450); association (*NAACP* v. *Alabama*, 357 U.S. 449); and travel (*Shapiro* v. *Thompson*, 394 U.S. 618, 629-631).

"[E]ducation underlies the whole substance of the political process and is antecedent to voting in the orders of both time and cause. All political behavior inevitably must reflect the presence or absence and the quality of education. A man's understanding of public issues is a function of those communications which are intelligible to him." [15]

The courts' statements are not merely rhetoric; all of the other institutions of government reflect similar concern for education. The last four presidents of this nation have expressed agreement with the courts.[16] Congress has enacted legislation providing funding for educational programs.[17] Education is made compulsory for at least ten

642-645 (1968); Michelman, *The Supreme Court, 1968 Term, Foreward: On Protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 28, 48 (1969).

[15] Coons, Clune and Sugarman, *supra* n. 14, at 368.

[16] *President Nixon:* 1969 U.S. Code Cong. and Adm. News at 2830 (Proclamation on American Education Week; September 26, 1969); *President Johnson:* 1968 Code at 4648-9 (Proclamation on American Education Week; August 29, 1968); 1965 Code at 1448-9 (Message on Education Act of 1965); *President Kennedy:* 1963 Code at 1450 (Education Message to Congress; January 29, 1963); *President Eisenhower:* 1958 Code at 5412 (Education Message).

[17] See *e.g.* Elementary and Secondary Education Act of 1965, 20 U.S.C. 236-244, 331, 332, 821-827, 841-848, 861-870, 881-885, National Defense Education Act of 1958, Title 20 U.S.C. and Johnson-O'Malley Act, Title 25 U.S.C.

years by New York and all but three of the other states.[18] New York's Constitution provides in Article XI, Section 1:

> The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

And, in fiscal 1968, 35 percent of New York's state and local tax dollars were spent on public schooling.[19]

We note that it is not necessary to recognize a federal constitutional right to an education in order to classify education a "fundamental interest". In a series of cases, this court has held qualifications for voting in state elections violative of the equal protection clause of the Fourteenth Amendment by application of the more stringent standard of review. *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 670; *Kramer* v. *Union Free School District,* 395 U.S. 621, 627, 630; *Cipriano* v. *City of Houma,* 395 U.S. 701, 704; *Evans* v. *Cornman,* 398 U.S. 419, 422.

These cases rest not on a federal constitutional right to vote, but on the ground that "once the franchise is granted, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper, supra,* 383 U.S. at 665; see also *Kramer, supra,* 395 U.S. at 629.[20] Indeed, in *Harper,* while noting that "the

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[18] N.Y. Education Law, § 3205(1)(a); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: Non-Constitutional Analysis*, 117 U. Pa. L. Rev. 373, 393-4, n. 74 (1969).

[19] Calculated from Advisory Commission on Intergovernmental Relations, State and Local Finances, Tables 8 and 12 (1969).

[20] Compare *Griffin* v. *Illinois*, 351 U.S. 12, 18. ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e.g.*, *McKane* v. *Durston*, 153 U.S. 684, 687-688 . . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."); and *Brown I*, *supra*, 347 U.S. at 494. ("Such an opportunity [of an education] where the state has undertaken to provide it, is a right which must be made available to all on equal terms.")

right to vote in federal elections is conferred by Art. I, § 2 of the Constitution," the Court found it unnecessary to decide whether "the right to vote in state elections" is conferred by the federal constitution. *Harper, supra,* 383 U.S. at 665. The challenged statutes were subject to more stringent review in these cases because voting was viewed as "fundamental" and "preservative of other basic civil and political rights" (*Harper, supra,* 383 U.S. at 667) and at the "foundation of our representative society." *Kramer, supra,* 395 U.S. at 626.[21] As we have shown, education is in the same position.

b) *Wealth is a "suspect" classifying factor*

Our contention that the statutory scheme must be judged by the compelling interest standard is buttressed by the fact that the admitted *impact* of the statutory scheme is to classify students based upon the affluence of their families. "Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored." *Harper* v. *Virginia State Board of Election Commissioners,* 383 U.S. 663, 668. [22] While rejecting plaintiff's claims, the court below agreed with plaintiffs' allegation that the statutory scheme would operate to stigmatize poor children (see Statement *supra* at 7), similarly to segregation based upon race

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[21] The court quoted from *Yick Wo* v. *Hopkins,* 118 U.S. 356 370 and *Reynolds* v. *Sims,* 377, U.S. 533, 561-62, respectively.

[22] See also *Griffin* v. *Illinois,* 351 U.S. 12; *Burns* v. *Ohio,* 360 U.S. 252; *Douglas* v. *California,* 372 U.S. 353; *Williams* v. *Illinois,* 399 U.S. 235; *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 807. ("[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, *Harper* v. *Virginia Board of Elections, supra,* two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. *Douglas* v. *California,* 372 U.S. 353 . . . ; *McLaughlin* v. *Florida,* 379 U.S. 184 . . .") (dictum).

in the dual system. See *Brown I, supra,* 347 U.S. at 494.[23] We note also that poor children, punished here for reasons wholly beyond their own control, "are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." *Graham* v. *Richardson,* 91 S. Ct. 1848, 1852 (quoting *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153, n. 4).

In cases which we have cited, lower federal courts and the California Supreme Court have concluded that the more rigorous standard of review is particularly appropriate when a case involves both the interest in education, and wealth classifications. *Van Dusartz* v. *Hatfield,* C.A. No. 3-71 Civ. 243 (D. Minn., October 12, 1971) (Mem. Op. at 6, 8); *Hargrave* v. *Mckinney, supra* at 413 F.2d 328; *Serrano* v. *Priest,* 487 P.2d 1241, 1250-1259 (S. Ct. Cal., 1971). See also *Hobson* v. *Hansen,* 269 F. Supp. 401, 513 (D.D.C., 1967), *affirmed, sub nom. Smuck* v. *Hobson,* 408 F.2d 175 (D.C. Cir., 1969).[24]

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[23] In his dissenting opinion, Circuit Judge Kaufman stated: "In short, the legislative scheme here creates two classes of children, not physically separate yet unequal — the poor suffer while the rich receive the full benefits of the state's educational program. But '[l]ines drawn on the basis of wealth or property, like those of race . . . . , are traditionally disfavored.' *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 668 (1966)." (Slip Op. at 4670.)

[24] Our contention that, on the facts of this case, wealth is a "suspect" classifying factor is consistent with *James* v. *Valtierra,* 402 U.S. 137. The lower court in *Valtierra* held that Article XXXIV of the California Constitution violated the equal protection clause of the Fourteenth Amendment, focusing on the fact that *on its face* Article XXXIV "applie[d] only to 'low income persons' . . . ." (313 F. Supp. at 4.) In reversing this Court viewed plaintiffs' challenge as directed *to the face* of the provision: "[A]ppellees contend that Article XXXIV denies them equal protection because it demands a mandatory referendum while many other referendums only take place upon citizen initiative." (402 U.S. at 141-142.)

In contrast, the admitted *impact* of the statutory scheme here is to apportion educational opportunity along lines of wealth. *Valtierra*

3. *The Decision Below Conflicts with this Court's Rulings on the Scope of the Fourteenth Amendment in Griffin* v. *Illinois*, 351 U.S. 12, *Douglas* v. *California*, 372 U.S. 353 and *Subsequent Cases*

a) *The Fourteenth Amendment principles established in Griffin-Douglas* and subsequent *cases*

In *Griffin* v. *Illinois*, 351 U.S. 12, this Court held that the Illinois system of criminal, appellate review, challenged by indigent defendants because of its failure to provide for free trial transcripts in the circumstances of their case, violated the Fourteenth Amendment by denying them the "adequate appellate review accorded to all [with] money enough to pay the costs in advance." *Griffin, supra*, 351 U.S. at 18. The state "concede[d] that . . . petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors." *Griffin, supra*, 351 U.S. at 16.

This Court decided *Griffin* on the premise that Illinois was not required by the Federal Constitution to afford any appellate review. "But that is not to say that a state that does grant appellate review can do so in a manner that discriminates against some convicted defendants on account of their poverty." *Griffin, supra*, 351 U.S. at 18.[25] Finally, emphasizing its antipathy to wealth classifications,

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may suggest that facial racial classifications are more carefully scrutinized than those based upon wealth, but construing *Valtierra* to foreclose our argument on wealth classification requires acceptance of the proposition that this Court limited, *sub silentio*, more than 15 decisions holding practices having an *impact* along lines of wealth violative of the Fourteenth Amendment. (See cases cited *supra* at 21, n. 22, and *infra* at 23-25, 29.)

[25] It is clear, therefore, that the decision below cannot be supported by any right-privilege rationale. See also *Graham* v. *Richardson*, 91 S.Ct. 1848, 1853.

the Court stated: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin, supra,* 351 U.S. at 19.

Griffin has had a steady growth. For example, in *Douglas* v. *California,* 372 U.S. 353, indigent criminal defendants challenged an appellate court's failure to appoint counsel to present their appeals. The court relied upon a rule requiring such appointment only if it determined, after examining the record, that counsel would be helpful to the defendant or the court. This Court, viewing the procedure as one in which "the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot", held that "an unconstitutional line [had] been drawn between rich and poor." *Douglas, supra,* 372 U.S. at 357.

In six cases in addition to *Griffin* and *Douglas,* this Court has held violative of the Fourteenth Amendment procedures nominally available to all criminal defendants or accused persons, but actually available in a less adequate form to indigents because of their poverty.[26] Finally, in four cases, the *Griffin* principle has been applied in instances where some requirement imposed by the State made entirely unavailable to the indigent defendant a remedy fully open to more affluent persons. For example, in *Burns* v. *Ohio,* 360 U.S. 252, payment of a $20 fee was required to invoke the criminal, appellate jurisdiction of

[26] *Eskridge* v. *Washington State Bd.*, 357 U.S. 214 (free transcript for appeal only if trial judge concludes justice promoted); *Swenson* v. *Bosler*, 386 U.S. 258 (no provision for counsel to brief appeal of convicted indigent); *Draper* v. *State of Washington*, 372 U.S. 487 (free transcript for appeal only if trial judge makes certain findings); *Long* v. *District Court*, 385 U.S. 192 (no provision for free transcript for indigent's appeal from denial of habeas corpus petition); *Gardner* v. *California*, 393 U.S. 367 (no provision for free transcript of hearing denying habeas corpus petition, where a *de novo* hearing on petition in appellate court); *Roberts* v. *LaVallee*, 389 U.S. 40 (no provision for free transcript for indigent—accused of testimony of witnesses at preliminary hearing).

the Ohio Supreme Court. Since the remedy was fully available to more affluent persons, the Court held that the fee requirement was violative of the Fourteenth Amendment as construed in *Griffin*.[27]

During the past two terms, this Court has again demonstrated its antipathy to wealth classification. In two cases "[a]pplying the teaching of the *Griffin* case", the Court has held "that an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense." *Williams* v. *Illinois*, 399 U.S. 240, 241; see also *Tate* v. *Short*, 91 S. Ct. 668.

b) *The Court of Appeals erroneously construed Griffin-Douglas and their progeny*

There is a striking parallel between the pivotal facts in *Griffin-Douglas* and this case. (1) Plaintiffs have a right under state law to attend public school, as petitioners in *Griffin-Douglas* had a right under state law to appeal their convictions. (2) Here, as in *Griffin-Douglas*, something, unavailable to indigents,[28] is an essential tool for enjoy-

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[27] See also *Smith* v. *Bennett*, 365 U.S. 708 ($4 filing fee for appellate review of denial of habeas corpus petition); *Lane* v. *Brown*, 372 U.S. 477 (filing of transcript — available to indigent only on request of public defender — necessary for appellate jurisdiction to review denial of *coram nobis* petition); *Williams* v. *Oklahoma City*, 395 U.S. 458 (filing of "case made" in appellate court necessary to invoke jurisdiction to review criminal conviction).

[28] It is true that the Court of Appeals suggested that the "fixed allowance" plaintiffs received under New York's Welfare law "was intended to cover this as well as other contingent needs." (Slip Op. 4649, n. 3.) Of course the suggested intent of the law is irrelevant; whether or not the parents were able to pay the fee is a question of fact.

Since this case was decided on a motion to dismiss, plaintiffs' affidavits and allegations of their inability to pay the fees must be taken as true. See *e.g. Cooper* v. *Pate*, 378 U.S. 546; *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 172.

ment of the right. (3) Without books, similar to an indigent without a transcript or an attorney, a student from an indigent family is denied the full benefit of the right "accorded to all [with] money enough to pay the costs in advance." *Griffin* v. *Illinois*, 351 U.S. 12, 18.

The equal protection clause is as clearly violated when the quality of education a child receives depends upon the affluence of his parents, as where "the kind of trial a man gets depends on the amount of money he has." *Griffin, supra*, 351 U.S. at 19. Indeed, in this case, unlike *Griffin*, children are punished for "no action, conduct or demeanor of theirs" (*Levy* v. *Louisiana*, 391 U.S. 68, 71), but instead because of their families' indigency wholly beyond their own control.

Despite the obvious parallels between *Griffin-Douglas*, their progeny, and this case, the lower courts rejected plaintiffs' povery claim. (The District Court did not even mention the claim.) We submit that the court below decided the Fourteenth Amendment issues "in a way in conflict with applicable decisions of this court; . . ." (Supreme Court Rule 19 (1)(b).)

The Court of Appeals rejected the poverty contentions because "[t]he reasoning of [the] cases [relied upon by plaintiffs] [29] is that the State is required to provide these services and access because to do otherwise would be to deprive indigents of due process. Obviously, though, due process is not involved here." (Slip Op. at 4661.) The court also argued that "such money as the School Board has to spend is being spent in such a way as to benefit all students (i.e. on teachers' salaries, building maintenance and the like). (footnote omitted.)" (Slip Op. at 4662.) Finally, while acknowledging that students whose families

[29] The court cited: *Boddie* v. *Connecticut*, 91 S.Ct. 780; *Griffin* v. *Illinois*, 351 U.S. 12; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, 365 U.S. 708; *Gideon* v. *Wainwright*, 372 U.S. 335.

could afford texts would no doubt receive a better education, the court said that this was due to their own means and not because the State provided them more. (Slip Op. at 4663.)

Any surface plausibility of this reasoning does not withstand scrutiny. First, as noted by Judge Kaufman in dissent, *Griffin* "rested by its own language squarely on the equal protection guarantee, as well as on due process . . . ." (Slip Op. at 4751.) See *Griffin, supra,* 351 U.S. at 13, 18.[30] Second, no distinction can be made because this case involves education rather than the criminal process. The Fourteenth Amendment makes no such distinction between criminal and other matters and this Court has not so construed it.[31] The *Griffin* opinion emphasizes the importance of fairness in the criminal process, but education is at least as important, as our argument at pages 16-21 demonstrates. Moreover, education may serve to make unneeded protection in the criminal process.[32]

Third, it could have been argued in *Griffin-Douglas* where appellate review was nominally available to the indigent, as the lower court did here, that "such money as the [State had] to spend [was] being spent in such a way as to benefit all [defendants]", that is, on salaries for judges and clerks, building maintenance, etc., and that

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[30] See also *Griffin, supra,* 351 U.S. at 34 (dissenting opinion of Harlan, J.); and *Williams* v. *Illinois,* 399 U.S. 235, 241, explaining *Griffin* as finding "a violation of the Equal Protection Clause . . . .

[31] See *e.g. Boddie* v. *Connecticut,* 91 S.Ct. 780; *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663; *Brown* v. *Board of Education,* 347 U.S. 483.

[32] See Coons, Clune and Sugarman, *supra,* n. 14, at 362. ["Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society . . . ." (footnote omitted.).] See also *Johnson* v. *Avery,* 393 U.S. 483, 487. ("Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." footnote omitted.)

to the extent the affluent defendant had a more adequate appeal, this was a result of a private supplement. In fact, similar contentions were urged *in dissent* by Justice Harlan in both *Griffin* and *Douglas*.[33] A majority of this Court held, however, that in certain contexts the Fourteenth Amendment requires more than simply facial neutrality.[34]

Strictly speaking, it would appear that in *Griffin-Douglas*, and this case, Fourteenth Amendment obligations could be satisfied by ways other than furnishing free a transcript, counsel or books. Thus, the state could release an indigent defendant [35] and the curriculum could be other than textbook orientated. However, to the extent that furnishing a transcript, counsel or books is the most likely state response, the affirmative action here is precisely analogous to *Griffin-Douglas*.

This Court has approved affirmative remedial action to provide equal educational opportunity. The *Brown I* opinion stated that the opportunity of an education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown I*, *supra*, 347 U.S. at 483, 493. Thereafter, in *Griffin* v. *School Board of Prince Edward County, Va.*, 377 U.S. 218, 233, this Court held that the district court had the authority to direct public officials to exercise their power to raise funds adequate to operate a racially non-discriminatory school system. And finally, in the past term, the Court upheld unanimously the order of a district court which

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[33] *Griffin*, *supra*, 351 U.S. at 34; *Douglas* v. *California*, 372 U.S. 353, 361-362.

[34] "Dissenting opinions here argue that the Illinois law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Griffin*, *supra*, 351 U.S. at 18, n. 11; see also *Williams* v. *Illinois*, 399 U.S. 235, 242.

[35] "(3) The remedy for the discrimination is simple, clear and effective — *i.e.*, give the appellant a transcript (and a lawyer) or else let him go; . . ." Coons, Clune and Sugarman, *supra* n. 14, at 362.

required state officials to provide substantial, additional student transportation. *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1. See also *United States* v. *School District 151 of Cook County, Illinois,* 301 F. Supp. 201, 232 (N.D. Ill. 1969), *affirmed as modified,* 432 F.2d 1147 (C.A.7, 1970) *cert. denied,* 402 U.S. 943; *Hosier* v. *Evans,* 314 F. Supp. 316, 320 (D. Vis. Is., 1970).

Our contention that plaintiffs present a substantial claim is buttressed by decisions of this Court invalidating, on Fourteenth Amendment grounds, fees in two additional areas. In each case, the Court's opinion stressed the fundamental interest involved. See *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663; *Boddie* v. *Connecticut,* 91 S. Ct. 780. In striking down Virgina's $1.50 poll tax, this Court stated in *Harper*: "wealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Harper, supra,* 383 U.S. at 670. The *Boddie* case involved fees for the commencement of divorce litigation. The Court held that the due process clause prohibited Connecticut from denying access to the courts to indigents seeking divorces in good faith, emphasizing "the basic position of the marriage relationship in this society's hierarchy of value. . . ." *Boddie, supra,* 91 S. Ct. at 784.

This case too, as we have shown, involves a fundamental interest. Here, as in *Harper,* "wealth or fee paying has . . . no relation to [an education]; the right to [an education] is too precious, too fundamental to be so burdened or conditioned."

4. *The Decision Below Conflicts with Rulings of this Court Applying the "Compelling State Interest" Standard of Review*

We maintain for the reasons set forth above that the challenged legislative scheme must be judged by the "com-

pelling state interest" standard. The district court purported to apply this test, finding it satisfied. (319 F. Supp. at 278.) The court reasoned that the classification was adequately justified by the adoption of a scheme which would, in the court's view: 1) advance the legislatures "legitimate interest in conserving the State's fiscal resources. . . ." (*Id.* at 279;) 2) insure "that as many as possible of [New York's] children receive textbooks" (*Id.* at 279-280;) and 3) fulfill "[t]he legislature's desire to foster the study of certain subjects [the sciences, mathematics and foreign languages]. . . ." (*Id.* at 280.)

The majority below approved the district court's conclusion on the compelling interest test (Slip Op. at 4655-4656), thereby incorporating the district judge's erroneous application of the standard.[36] The decision below conflicts with rulings of this court in three respects: 1) by failing adequately to consider the availability of less onerous alternatives for achieving the state's objectives; *Shapiro* v. *Thompson*, 394 U.S. 618, 631, 633-638; 2) by approving a scheme under which the state protects "the fiscal integrity of its programs" through "invidious distinctions between classes of citizens"; *Graham* v. *Richardson*, 91 S. Ct. 1848, 1853; and 3) by failing adequately to weigh "the interests of those who are disadvantaged by the classification" (*Kramer* v. *Union Free School District*, 395 U.S 621, 626), namely, indigent students without books.

a) *The treatment of alternatives for satisfying the state's interests*

The district court began its analysis correctly, recognizing by references to alternatives that the availability

[36] In approving the district court's compelling interest analysis, the court below referred specifically only to the legislative desire "to promote education in [certain] fields . . . ." (Slip Op. at 4655-4656.)

of a less onerous alternative for achieving the state's goal must be considered where the compelling interest test applies. (319 F. Supp. at 279.) The district judge erred, however, in giving full consideration to only one alternative, *i.e.*, "grants . . . spread thinly." (*Id.* at 279-280.) Expressing the view that texts for grades 7 to 12 are more costly than those for grades 1-6, Judge Travia stated that the alternative of "grants . . . spread thinly" among all students (grades 1 to 12) could, in view of the cost factor, result in a larger number of students being without books. (*Id.* at 280.) The court concluded that "New York State has a legitimate, compelling interest in seeing to it that as many as possible of its children receive textbooks." (*Id.* at 280.)

Plainly, there were other alternatives for satisfying the three state interests discussed by the courts below. First, apparently without additional expenditures, books could be provided without cost only to those students in grades 1 to 12 from indigent families, a practice similar to one used in the past in New York state.[37] Second, as plaintiffs pointed out in the Court of Appeals, state law could include texts for grades 1-6 in the definition of "ordinary contingent expenses" for which a local district can levy a tax even in the absence of voter approval. (See Plaintiffs' Brief below at 13-14, and see *supra* at 4, n.4.) [38]

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[37] Former Section 3209 of the Education Law, repealed by Social Services law Section 131a (Ch. 517, Laws of 1970), required welfare officials to "furnish indigent children with suitable . . . books, to enable them to attend" school. This provision was in effect as early as 1927. (See N.Y. Laws of 1928, Ch. 646, Section 627 F.) Moreover, the New York law to implement *Gideon* v. *Wainwright*, 372 U.S. 335, requires the appointment of counsel for persons "financially unable to obtain counsel. . . ." N.Y. Code of Criminal Procedure, Section 308.

[38] The majority below appears to have suggested that under *James* v. *Valtierra*, 402 U.S. 137, the state's right to involve the electorate in the financing process is unlimited. (Slip Op. at 4659-4660.) However, the inequity here cannot be justified by this rationale. "A citi-

Under each of these alternatives, costs to the state would apparently not be higher, and all students in grades 1 to 12, including those from indigent families, could have texts, the maximum possible impact. And, accordingly, each alternative would also foster development in the particular subjects to which the legislature referred.

It is settled that legislation abridging fundamental interests is invalid if there are such narrower means or less restrictive alternatives for accomplishing governmental purposes. *Kramer* v. *Union Free School District, supra,* 395 U.S. at 632; *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204, 212-213; *NAACP* v. *Alabama,* 377 U.S. 288, 307-308; *Shelton* v. *Tucker,* 364 U.S. 479, 488; *Shapiro* v. *Thompson, supra,* 394 U.S. at 631. "The breath of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker, supra,* 364 U.S. at 488.

The review of alternatives must be a searching one. *Shapiro* v. *Thompson, supra,* 394 U.S. at 633-8; see also *Carrington* v. *Rash,* 380 U.S. 89, 95-6; *Williams* v. *Illinois,* 399 U.S. 235, 244-5. The incomplete consideration of alternatives demonstrates the wisdom of the Seventh Circuit's decision in *Williams* v. *Page,* —— F.2d —— (1971), the case with which the Court of Appeals decision conflicts, requiring an "evidentiary hearing" on similar claims. Here, in the absence of such a hearing, the alternatives considered in the district court's opinion were those developed by court.

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zen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 736-737; *Hall* v. *St. Helena Parish School Board,* 197 F. Supp. 649 (E.D. La., 1961), *affirmed per curiam* 368 U.S. 515 ("No plebiscite can legalize an unjust discrimination." 197 F. Supp. at 659.)

b) *The "fiscal resources" arguments*

There are three basic flaws in the district court's "fiscal resources" argument, approved by the Court of Appeals. First, we have noted above the availability of options which would apparently not involve additional expenditures, contrary to the assumptions of the district judge.

Second, the district court rejected consideration of any alternative involving increased expenditures. (319 F. Supp. at 279.) However, states have adopted new procedures involving expenditures of funds in response to many decisions of this Court. *Griffin-Douglas* and their progeny and the landmark decision in *Gideon* v. *Wainwright*, 372 U.S. 335, holding that counsel must be furnished to indigent criminal defendants in state proceedings — are obvious examples. Constitutional rights would be hollow if states could avoid implementation simply by pleading that expenditures were required.[39]

Third, the kind of classification involved here cannot be justified by the possibility of increased costs. In *Shapiro* v. *Thompson, supra,* 394 U.S. at 633, this Court stated:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of citizens. *It could not for example reduce expenditures for education by barring indigent children from its schools.* Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. *The saving of wel-*

[39] See also the discussion *supra* at 28-29.

fare costs cannot justify an otherwise invidious classification. (emphasis added; footnote omitted) [40]

Here, the saving of costs for education cannot "justify an otherwise invidious classification." The courts dictum on education almost precisely covers this situation. While children are not barred from school, they are, on this record, "barred" from an essential tool of an education.[41]

c) *The special interests of the children disadvantaged by the classification*

The governing standards, as we note above, require that great weight be given to the "interests of those who are disadvantaged by the classification." *Kramer* v. *Union Free School District,* 395 U.S. 621, 626; *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204, 209-212; *Evans* v. *Cornman,* 398 U.S. 419. Attention to this factor demonstrates that this is an even clearer case for application of the Fourteenth Amendment than *Griffin-Douglas* and their progeny, where the Court assumed only that the interests of the petitioners in the criminal process were the same as more affluent persons. Here, there is a sound basis for arguing that the "interests of those who are disadvantaged" by the challenged classification — children from indigent families in grades 1 to 6 — are stronger than those who have texts, other elementary students and students in grades

[40] The Court followed *Shapiro* during the past term in *Graham* v. *Richardson,* 91 S.Ct. 1848, 1853.

[41] Any reliance by the local defendants on the collection of fees to defray costs would not support a conclusion that the state interest is compelling. "We are thus left to evaluate the states asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in *Griffin* v. *Illinois,* 351 U.S. 12 (1956)." *Boddie* v. *Connecticut,* 91 S.Ct. 780, 788.

7 to 12. We take this position on the basis of legislation and literature which recognize both the critical importance of early childhood education and the need for special attention to the educational problems of the poor.[42]

First, in 1965, Congress enacted the Elementary and Secondary Education Act, Pub. Law 89-10. Title I of the law (20 U.S.C. 241a-241m) is a comprehensive program for providing federal financial assistance to local school systems with concentrations of children from low income families. The congressional declaration of policy in Section 241a begins by recognizing "the special educational needs of children of low-income families." School systems are required by the law, implementing regulations and other statements of governing criteria promulgated by the Office of Education to concentrate Title I programs in those attendance areas with "high concentrations of children from low income families. . . ." 20 U.S.C. 241 e (a) (1); 45 C.F.R. Part 116, § 116.17(d); United States Office of Education, ESEA Program Guide 44, March 18, 1968, § 1.1.[43]

Second, in April, 1970, Congress amended Title One in Pub. Law 91-230. Section 132 (a) recognizes the importance of projects at the elementary level, requiring, with certain exceptions, that Title One funds be used "in preschool programs and in elementary schools serving areas with

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[42] It is proper for the court to consider these materials, *Brown* v. *Board of Education*, 347 U.S. 483, 494, n. 11; *Skinner* v. *Oklahoma*, 316 U.S. 535, 545, n. 1 (concurring opinion of Stone, C.J.); *Griffin* v. *Illinois*, *supra*, 351 U.S. at 19; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 399; *Mapp* v. *Ohio*, 367 U.S. 643, 651-52, n. 7. Their use here seems particularly appropriate since plaintiffs need only show that their claims are substantial.

[43] The term "educationally deprived children", is defined to include "children who are handicapped or whose needs for . . . special educational assistance result from *poverty*, neglect, delinquency, or cultural or linguistic isolation from the community at large. 45 C.F.R. Part 116, § 116.1 (i) (emphasis supplied.)

the highest concentrations of children from low-income families. . . ." [44]

Third, available expert evidence supports the conclusion of the Congress.[45] It presents the following pertinent propositions: 1) a challenge to earlier notions of genetically determined and fixed intelligence — Hunt (1969, at 191-2); Bloom (1964, at 87-90); Bloom, Davis and Hess (1967, at 12); 2) a suggestion that there is considerable plasticity in intelligence in the pre-school and early elementary years — Bloom (1964, at 87-90; 126-9); 3) and accordingly, a suggestion that early education is critical — Bloom (1965, at 127-8); Bloom, Hess and Davis (1967, at 12, 16, 22); Hunt (1969, preface at VIII). It is noteworthy that both Hunt (1969, at 209) and Bloom, Hess and Davis (1967, at 30) refer to the absence of books in the home as one of the underlying causes of the educational deficiencies exhibited by poor children.

The expert evidence also appears to support plaintiffs' contention that the book distribution procedure will adversely affect poor children "psychologically [and] emotionally. . . ." (App., 15.) Many children from culturally deprived families begin school not having had adequate

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[44] The Report of the Senate Committee on Labor and Public Welfare (Senate Report 91-634, 91st Congress, 2d Session) provides the following rationale for the amendment (at 20): "This requirement in part C was adopted by the Committee on the basis of growing evidence which indicates that the early years of education are of paramount importance in a child's development." The Report also states that Title I has focused federal monies "on what may well be the most crucial problem challenging our school systems today: how to educate successfully the children of America's poor." (*Id.* at 7.)

[45] See Benjamin S. Bloom, Allison Davis and Robert Hess, *Compensatory Education for Cultural Deprivation* (Holt, Rinehart and Winston, Inc., 1967) [cited: (Bloom, Davis, Hess, 1967)]; Benjamin S. Bloom, *Stability and Change in Human Characteristics* (John Wiley and Sons, Inc. 1964) [cited: Bloom (1964)]; J. McVicker Hunt, *The Challenge of Incompetence and Poverty*, "Papers on the Role of Early Education" (University of Illinois Press, 1969) [cited: Hunt (1969)].

opportunities for "stimulation, language development, and intellectual development. . . ." (Bloom, Davis, Hess, 1967, at 15). Their experience does not prepare them well for coping with the requirements of public schools. (*Id.* at 21.) This frequently means that "[a]s each year of school goes by, the culturally disadvantaged child suffers further frustration and failure." (*Id.*) It would appear clear that the situation involved in this case would aggravate the problem.

Thus, the particularly vital interests of indigent children in educational opportunities — especially books — during their elementary schooling adds further support to the substantiality of plaintiffs' case. Plainly, it can not be said these children are "substantially less interested" in books than those who receive them. *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204, 212.

5. *The Decision Below Is Not Supported by this Court's Ruling in* Dandridge *v.* Williams, *397 U.S. 471*

The Court of Appeals majority relied heavily on this Court's decision in *Dandridge* v. *Williams,* 397 U.S. 471, in rejecting plaintiffs claims. First, the court read *Dandridge* to establish that the compelling interest standard is inapplicable in the circumstances of this case. (Slip Op. at 4661-4662.) Second, the court below purported to apply the "reasonable basis" standard in accord with its application in *Dandridge.* (Slip Op. at 4656-4658.) *Dandridge* does not sweep so broadly.

First, this case is factually different from *Dandridge* because of the admissions of the local defendants as to the "essential" nature of texts, and the impact of their absence. At a minimum, there is a triable issue as to whether this situation involves, in practical effect, a *total denial* of education. *Dandridge,* in contrast, involved a *dilution* of wel-

fare benefits. In addition, unlike *Dandridge*, it is admitted that students are divided along lines of wealth, and the Court of Appeals agreed with plaintiffs' contention that this stigmatizes poor students, similarly to racial segregation in the dual system. Compare *Dandridge* v. *Williams*, *supra*, 397 U.S. at 485, n. 17; *Palmer* v. *Thompson*, 91 S. Ct. 1940, 1965-1966 (dissenting opinion of White, J.)[46]

Second, in *Dandridge*, this Court expressed the standard to be applied as follows: "It is enough that the State's action be rationally based *and* free from invidious discrimination." 397 U.S. at 487. (emphasis added.) The court below referred to "limited resources" (Slip Op. at 4658), identified the legislature's goal in the challenged scheme to be the fostering of certain subjects, termed its action "clearly justified in terms of the goals it sought thereby to advance" and concluded that the *Dandridge* standard was satisfied. (Slip Op. at 4658.) It inquired no further.

We submit that this analysis did not satisfy either branch of the *Dandridge* standard. First, each of the courts below referred to state efforts to conserve limited resources. From this viewpoint, the statutory scheme is completely irrational. A millionaire's children in grades 7 to 12 are furnished free texts, hardly a method of conserving resources. Meanwhile, children of the poor in grades 1-6 are denied an essential educational tool. Second, providing books to the children of the affluent in grades 7-12, but denying them to poor children in grades 1-6 does not maximize the impact of state aid, another stated objective. Third, students who must do without texts in the elementary grades will not be helped "in the fields of science, mathematics [and] foreign languages" by having texts in the secondary grades.

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[46] While we recognize the importance of the interests involved in *Dandridge*, the wealth classification and the impact on education make this an appropriate situation for application of the compelling interest standard, as we have shown above at 15-22.

There are other state policies which must be weighed in assessing the "rationality" of the legislative scheme. The policy manifested in New York's compulsory school attendance law [Education Law §3205(1)(a)] is not satisfied by having children sit bookless in the classroom. We note also that the legislature's statement of policy, from which the court identified the state's interest here, referred not only to promoting certain subjects, but also stated in part: "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. *This calls for more adequate educational opportunities and...* (promoting certain subjects) . . . ." (Quoted in Slip Op. at 4658; emphasis added.) Given all of these considerations, we do not believe that the scheme may be termed "rationally based."

It is clearer that the situation is not "free from invidious discrimination." The State requires plaintiffs to attend school. They are without essential books, and therefore, the local defendants admit, have a lesser educational opportunity than students from more affluent families. Further, the court below concedes, they may be stigmatized, similarly, we submit, to black students in the dual system. *Wisconsin* v. *Constantineau,* 91 S.Ct. 507, 510. None of this is due to any "action, conduct or demeanor of theirs . . . ." *Levy* v. *Louisiana,* 391 U.S. 68, 72.[47] And, finally, it would appear that there are alternatives which would both serve the state's interests and avoid these consequences. *Carrington* v. *Rash,* 380 U.S. 89, 95-96; *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349.[48]

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[47] See also *Chandler* v. *South Bend Community School Corporation,* C.A. No. 71S 51 (N.D. Ind., Aug. 26, 1971), the district court school fees case discussed above at n. 7; (". . . . Defendant herein has totally failed to present any reason why the plaintiff-students should incur sanctions for their parents' failure to pay school fees." Mem. Op. at 6.)

[48] Consideration of alternatives is proper. *Carrington,* like *Dandridge* written by Mr. Justice Stewart, held violative of the equal protection

If this is not "invidious discrimination," we are quite at a loss to know what is.

6. *The Statutory Scheme Denies Due Process Of Law*

The lower court's conclusion that this case presents no due process issues [49] conflicts with decisions of this Court recognizing that the due process clause does protect against arbitrary government infringment of important individual interests, including education. *Meyer* v. *Nebraska*, 262 U.S. 390; *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Bolling* v. *Sharpe*, 347 U.S. 497;[50] see also *Williams* v. *Illinois*, 399 U.S. 235, 259-266 (concurring opinion of Harlan, J.) Moreover, despite its view on the due process clause, the lower court expressed agreement with plaintiffs' allegation that poor children might be stigmatized in the operation of the statutory scheme. See *Wisconsin* v. *Constantineau*, 91 S. Ct. 507, 510.

In *Meyer*, this Court reversed the conviction of a teacher under a Nebraska law which forbid the giving of instruction in a language other than English to a student below the ninth grade. The Court stressed the importance of education and noted Nebraska's compulsory attendance law.

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clause a Texas Constitutional provision prohibiting a person moving to Texas while a member of the armed forces from voting in any state election while a member of the armed forces. The Court discussed alternatives which the state could employ to satisfy its purported objectives. 380 U.S. at 95-96. The opinion referred neither to the compelling interest standard, nor to a federal constitutional right to vote. It did refer to the importance of voting (380 U.S. at 94, 96), but the same is true as to education. See 16-21 above.

In *Dean Milk* this Court held inconsistent with the commerce clause an ordinance forbidding the sale of milk in Madison unless processed and bottled at an approved plant within five miles of Madison. The ruling was based, in part, upon the apparent availability of "reasonable and adequate alternatives . . . ." (340 U.S. at 354.) We submit that it is more appropriate to evaluate alternatives here where the critical personal interests of indigent students are involved.

[49] Slip Op. at 4661. ("Obviously, though, due process is not involved here.")

[50] See discussion above at 16-21 on the importance of the individual interest in education.

Meyer, supra, 262 U.S. at 400. The ruling rested, in part, on the premise that the law arbitrarily burdened "the opportunities of pupils to acquire knowledge" in violation of the due process clause. 262 U.S. at 401-403.[51]

Mr. Justice Harlan premised his concurrence in *Williams* v. *Illinois,* 399 U.S. 235, 259-266, on the due process clause, terming the issue whether the challenged legislation "arbitrarily infringes a constitutionally protected interest. . . ." 399 U.S. at 259.[52] Applying a standard expressed in his opinion,[53] he concluded that the Illinois procedure was violative of the due process clause.

This case involves a due process violation, given these controlling principles:

First, an important individual interest is significantly burdened. In *Meyer* "the opportunities of pupils to acquire knowledge" were infringed by a rule forbidding the teaching of foreign languages. Here, the burdening of the same interest results from the failure of the state to provide indigents an admittedly essential educational tool. The deprivation is more extreme in this case, extending to all elements of the curriculum in which books are used.

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[51] In *Bolling* v. *Sharpe*, 347 U.S. 497, this Court held that operation of a dual school system in the District of Columbia violated the due process clause of the Fifth Amendment. The Court concluded: "Segregation in public education is not reasonably related to any proper governmental objective, thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." 347 U.S. at 500.

[52] The majority held violative of the equal protection clause the Illinois procedure allowing imprisonment of an indigent criminal defendant, in default of payment of a fine, beyond the maximum authorized by the statute regulating the substantive offense. *Wililams, supra,* 399 U.S. at 241.

[53] ". . . the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." *Williams, supra,* 399 U.S. at 260 (concurring opinion).

Second, there are significant questions about "the rationality of the connection between legislative means and purpose. . . ." *Williams* v. *Illinois, supra,* 399 U.S. at 260 (concurring opinion). Providing books to children of affluent families in grades 7-12 and denying them to poor children in grades 1-6 is a wholly irrational method of furthering the purported state interests of conserving resources and maximizing the impact of state aid. Further, New York's purpose can not be understood only by considering the laws immediately involved in this case. The denial of texts to children is entirely inconsistent with the policy manifested by the state's compulsory attendance law. [N.Y. Education Law § 3205 (1)(a).] Surely, the state interest reflected in § 3205 (1)(a) is not satisfied by having students sit bookless in the classroom.

Third, there is an asserted state interest in promoting development in certain subjects taught at the secondary level. We submit, however, that it is not such as to outweigh the impact of the challenged scheme on the critical interests of the plaintiffs [*Williams* v. *Illinois, supra,* 399 U.S. at 262-263 (concurring opinion)],[54] particularly in view of the apparent "existence of alternative means for effectuating the [state's] purpose[s] . . . ." *Williams,* supra, 399 U.S. at 260 (concurring opinion).[55]

Fourth, a student's interest in an education is a personal one. *Meyer,* supra, 262 U.S. at 401; accordingly, it is patently arbitrary for that interest to be burdened due to a circumstance over which the child has no control, the indigency of his family. See *Levy* v. *Louisiana,* 391 U.S. 68, 72;[56]

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[54] One commentary notes about *Meyer:* "The individual's interest in education is personal and important, important enough to subdue the arguably rational purpose of the state to democratize its children and thus to avoid the divisions of sect and creed." Coons, Clune and Sugarman, *supra* n. 15, at 376.

[55] See discussion of alternatives *supra* at 30-32.

[56] *Levy* was decided on equal protection grounds and we cite it above in support of our argument based on that clause. However,

Robinson v. *California*, 370 U.S. 660, 667 and n. 9; *Boddie* v. *Connecticut*, 91 S. Ct. 780, 788.[57]

Fifth, our due process contention is buttressed by the acknowledged stigmatization. *Wisconsin* v. *Constantineau*, 91 S.Ct. 507, 510. As Judge Kaufman stated in dissent below (Slip Op. at 4670):

> The psychological and social impact of the badge of inferiority implied by their disfavored treatment must extend far beyond the classrooms . . . . The enduring lesson they are thus taught in the public schools they attend without books is that wealth breeds favored treatment while disadvantage leads on to still greater handicaps.

This stigmatization is much more than simply the reflection of private inequality; it is directly attributable to the operation and interaction of the state's education laws in the schools which poor children are required by state law to attend. And unlike *Constantineau*, there is not even a claim of any attempted remedial benefit to those stigmatized.

C. Alternatively, the Court of Appeals Decided Important Questions of Federal Law which Have Not Been but Should Be Settled by this Court

We argue throughout that the court below decided federal questions "in a way in conflict with applicable decisions

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"the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling* v. *Sharpe*, 347 U.S. 497, 499.

[57] See also *Chandler* v. *South Bend Community School Corporation*, No. 71 S 51 (N.D. Ind., Aug. 26, 1971) ["The school fee collection procedure as applied to these minor plaintiffs, conditions *their personal* right to an education upon the vagaries of their parent's conduct, an intolerable practice condemned by this Court in *Carpenter, et al.* v. *Arnold*, 70 S 54 (1970)." [Mem. Op. at 6.]

of this court; . . . ." [Supreme Court Rule 19(1) (b).] However, this case can be viewed as presenting new questions. Accordingly, in the alternative, we submit that the Court of Appeals "decided an important question of federal law which has not been, but should be, settled by this court; . . ." (*Id.*) The fees at issue here present an important question just as the ones involving the criminal process, voting and divorce litigation did in *Griffin* and its progeny, *Harper* and *Boddie*.

Conclusion

For the reasons expressed in this brief and in the petition, this Court should agree to review the decision of the Court of Appeals for the Second Circuit in this case.

By: J. Harold Flannery
Robert Pressman
Paul R. Dimond
Jeffrey Kobrick
Center for Law and Education,
Harvard University

The United Ministries
in Public Education

November, 1971

APPENDIX ONE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH DISTRICT

June 9, 1971

WILLIAMS, ET AL.

v.

PAGE, ET AL.

No. 18536

Appeal from the United States District Court for the Northern District of Illinois

Before: Swygert, Ch. J; Kiley, C.J., Fairchild, C.J.

O R D E R

This action for declaratory and injunctive relief and amages was brought pursuant to the Civil Rights Act of 71, 42 U.S.C. § 1983, and jurisdiction was claimed under U.S.C. §§ 1343, 2201, 2202, 2281, 2282 and 2284. Upon otion of the defendants and after receiving briefs of the arties, the district court dismissed the complaint and the use for failure to state a claim upon which relief could be anted.

The complaint alleges that graduation participation is essential part of a child's education and the complaint ay be construed as claiming that in the schools concerned e activities for which the fees are required have been cognized by the school administrators, teachers, parents d students as integral parts of the school experience, om which indigent children are being excluded. Until ese and related factual questions are explored at an evi-ntiary hearing, the precise contours of the constitutional ghts which plaintiffs claim were violated are not readily scernible.

As Professor Moore has stated the rule, "[A] complaint ould not be dismissed for insufficiency *unless it appears*

to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." 2A J. Moore, Federal Practice ¶ 12.08, at 2271-74 (2d ed. 1968). This is especially true in actions brought under 42 U.S. § 1983. *Escalera* v. *New York City Housing Authority,* 425 F.2d 853, 857 (2d Cir. 1970). Applying that standard to the instant complaint, the complaint should not have been dismissed without receiving evidence. The judgment of the district court is reversed and the cause remanded for further proceedings.

Supreme Court U.S.
FILED
FEB 8 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 71-5685

DAISY JOHNSON, ET AL., PETITIONERS,

—v.—

NEW YORK STATE EDUCATION DEPARTMENT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

HENRY A. WEINSTEIN
Attorney for Board of Education,
Union Free School District No. 27
Town of Hempstead
158 Third Street
Mineola, New York 11501
Telephone 516-747-2734

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COUNSEL PRESS, INC., NEW YORK, N. Y.

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BRIEF IN OPPOSITION

Introduction

This brief is submitted in opposition to the petition for certiorari and, for the reasons herein set forth, it is urged that the Court decline to review the decision of the Court of Appeals for the Second Circuit.

(Parenthetical numeral references are to the Appendix herein.)

Preliminary Statement

In this action commenced by three parents on behalf of their minor children who attend the schools operated by the Board of Education, Union Free School District No. 27, Town of Hempstead, Nassau County, New York, commonly known as the West Hempstead Public Schools, plaintiffs seek to review the decision of the Court of Appeals for the Second Circuit, in affirming the order of the District Court, which denied the convening of a three judge court and dismissed the complaint.

The thrust of the complaint is to declare Sec. 701 of the New York State Education Law in violation of the equal protection clause of the 14th Amendment to the Constitution of the United States. This section in substance, authorizes a board of education to loan textbooks without charge to children enrolled in grades seven to twelve. No similar provision exists for children enrolled in grades one to six. Sec. 703 of the New York State Education Law authorizes the free distribution of textbooks to pupils in grades one through six only upon the voting of a tax therefor by the qualified voters of the school district.

The West Hempstead school district voters have rejected proposed budgets for the school years 1970-1971 and 1971-1972. The West Hempstead Board of Education thereupon, in accordance with Sec. 2023 of the New York State Education Law, levied a tax in the absence of voter approval for the sums estimated necessary for teachers' salaries and for ordinary contingent expenses. Ordinary contingent expenses are those mandated by statute or deemed absolutely necesasry in order to operate and maintain the schools. Excluded are those expenses which by law, only the voters can authorize.

The thesis of the attack upon the constitutionality of Sec. 701 of the Education Law is that the classification of free textbooks is arbitrary, without any compelling state interest, and without a rational relationship to any state end; that the requirement continued in Sec. 703 of the Education Law for voter approval is discriminatory; and that Sec. 701 of the Education Law is a denial of equal educational opportunity.

The defendant Board of Education believes that textbooks for all pupils are essential to a quality educational program and a necessary and basic tool in the education of youngsters. This action is opposed principally because we believe that the remedy lies with the New York State Legislature and not with this Court.

ARGUMENT

It is clear that Sec. 701 of the Education Law is inextricably related to the annual apportionment of public monies to local school districts by the State of New York and to the operating budget of the State of New York. Sec. 701(7) of the Education Law provides that apportionment shall be paid at such times as may be determined by the commissioner of education and approved by the director of the budget.

As was observed by the District Court, (A41) prior to 1965, Sec. 701 made no provision for free textbooks and it was left to the voters in school districts to levy a tax in order to furnish textbooks in grades one to twelve. The legislative choice to allocate state funds for textbooks in grades seven to twelve resulted in giving aid where the need was greatest and where it would do the most good (A44). This is apparent from the declaration of legislative policy, which among other things, proclaims that an insufficient proportion of our population is educated in the fields of science, mathematics and foreign languages.

We believe that Sec. 701 of the Education Law should be *amended* so as to provide for the loan of textbooks free to all children attending our schools. This, however, is part and parcel of the desperate need of all school districts for additional state funds in all areas of educational concern in order to serve the needs of students in a dynamically changing society. But this is a matter for the New York State Legislature and not the Courts. As was noted by the District Court (A47) in quoting *McInnis* v. *Shapiro*, 293 F. Supp. 327, aff'd. 394 U.S. 322, (1969) "(the) allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court."

In analyzing the judgment of the State Legislature, the Circuit Court below (A15, 16) observed:

> "Thus, clearly the law is a valid means by which New York leaves some control over the school budgets to the voters of the affected school districts."

The Circuit Court below also concluded (A12):

> "Our function is not to enact laws for the State of New York or to tell the Legislature how better they could have legislated. We are restricted to making an examination of the law as actually enacted and to declaring whether there is a reasonable basis for this classification."

CONCLUSION

There is no basis for certiorari and the Court should decline to review the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

HENRY A. WEINSTEIN
Attorney for Board of Education,
Union Free School District No. 27
Town of Hempstead,
Nassau County, New York